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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PATRICK M. HYATT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

This case, on remand for further consideration in light of this Court's decision in *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), is a North Carolina-wide class action brought under 42 U.S.C. 405(g) to challenge the Secretary's policies regarding the manner in which allegations of pain, hypertension and diabetes mellitus are evaluated in determining whether a claimant is eligible for Social Security disability benefits. The questions presented are:

1. Whether the court of appeals erred in requiring the Secretary to reopen the claims of thousands of class members, even though (i) Congress approved the regulatory policies at issue, and (ii) the class members involved knowingly abandoned their claims when they either failed to seek administrative review of the preliminary decisions denying their claims or, if they sought administrative review, failed to seek judicial review within 60 days of the Secretary's final decision.

2. Whether the court of appeals correctly awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act.

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v.

PATRICK M. HYATT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. 1a-13a[1]) is reported at 807 F.2d 376. The prior opinion of the court of appeals (App. 15a-27a) is reported at 757 F.2d 1455. The opinion of the district court granting injunctive relief (App. 28a-61a) is reported at 579 F. Supp. 985, and the order of the district court certifying the class (App. 65a-71a) is unreported. The opinions of the district court awarding respondents attorney's fees and costs (App. 81a-91a, 92a-103a) are reported at 586 F. Supp. 1154 and 618 F. Supp. 227.

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[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari.

JURISDICTION

The judgments of the court of appeals were entered on December 5, 1986, and the petition for rehearing was denied on February 12, 1987 (App. 14a). On May 5, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 205(g), 223(d)(1)(A), (2)(A) and (2)(C), and 1614(a)(3)(A), (B) and (G) of the Social Security Act, 42 U.S.C. (& Supp. III) 405(g), 423(d)(1)(A), (2)(A) and (2)(C), 1382c(a)(3)(A), (B) and (G); Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799; 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921; and Social Security Ruling 82-55 are reproduced at App. 104a-121a.

STATEMENT

This is a North Carolina-wide class action brought pursuant to 42 U.S.C. 405(g) to challenge the policies of the Secretary of Health and Human Services regarding the manner in which a claimant's allegations of pain, hypertension or diabetes mellitus are evaluated in determining whether he is entitled to disability benefits under Title II or Title XVI of the Social Security Act. Although Congress ratified the general policies at issue when it enacted the Social Security Disability Benefits Reform Act of 1984, the court of appeals ordered the Secretary to reopen the claims of tens of thousands of class members who failed to pursue their administrative remedies after their claims were initially denied or who failed to seek judicial review within 60 days of the Secretary's final decision. The issues in this case are closely related to those in *Bowen* v.

Polaski, petition for cert. pending, No. 86-1617, and we therefore suggest that the petition in this case be held and disposed of as appropriate in light of the Court's disposition of *Polaski.*

A. THE STATUTORY AND REGULATORY FRAMEWORK

1. PROCEDURAL PROVISIONS

The statutory and regulatory provisions governing the four-stage administrative review process—which consists of the initial decision, reconsideration, ALJ hearing, and Appeals Council review—are described in our certiorari petition in *Polaski* (at 2-3). See also *Bowen* v. *City of New York,* No. 84-1923 (June 2, 1986), slip op. 3.

2. SUBSTANTIVE PROVISIONS

a. *Evaluation of Pain*

The Social Security Act provides that in order for a claimant to be found disabled, his impairment must "result[ ] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3), 1382c(a)(3). See *Mathews* v. *Eldridge,* 424 U.S. 319, 336 (1976). Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. The Social Security Administration (SSA) elaborated upon these regulations in Social Security Ruling (SSR) 82-58, which is discussed in our certiorari petition in *Polaski* (at 4).

b. *Hypertension and Diabetes: The Severity Regulation*

The policies regarding the evaluation of hypertension and diabetes mellitus that respondents challenged in this

case were particular applications of the "severity" regulation, the validity of which is before this Court in *Bowen* v. *Yuckert,* No. 85-1409 (argued Jan. 13, 1987). The severity regulation (20 C.F.R. 404.1520(c), 416.920(c)) is part of the five-step "sequential evaluation" process that was established by the Secretary to guide the decision-maker (the state agency, the administrative law judge (ALJ), or the Appeals Council) in determining whether a claimant is disabled under the general statutory standards in 42 U.S.C. (& Supp. III) 423(d)(1)(A), (2)(A) and (2)(C), 1382c(a)(3)(A), (B) and (G). See *Yuckert* Pet. Br. 3-5; *Bowen* v. *City of New York,* slip op. 2-3.[2] An impairment is not "severe" under the regulation if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which are defined to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have a "severe" impairment, he will be found not to be disabled, without consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).

In 1982, SSA issued SSR 82-55, (reproduced at App. 115a-121a), in order to give more specific content to the severity regulation. SSR 82-55 furnished a general statement of the operation of the severity regulation, and then further explained (App. 116a):

> Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe have now been recog-

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[2] The sequence in which the severity of the impairment is considered is now somewhat different for the evaluation of claimants who already are receiving disability benefits. See 20 C.F.R. 404.1594(f), 416.994(b)(5). See *Yuckert* Pet. Br. 4 n.1.

> nized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines on the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

Among the 20 examples were (*id.* at 119a):

> Hypertension without significant organ damage [*i.e.*, damage to the heart, eyes, kidneys, or brain], current or past.

and (*id.* at 120a):

> Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episode of acidosis.

SSR 82-55 subsequently was rescinded, in April 1985, as part of the Secretary's reevaluation of the severity step of the sequential evaluation process. App. 9a; *Yuckert* Pet. Br. 48 n.29.

B. THE PROCEEDINGS IN THIS CASE

1. This class action was brought in the United States District Court for the Western District of North Carolina on behalf of applicants for and recipients of Social Security disability benefits in North Carolina. The suit was commenced on August 5, 1983, by Patrick Hyatt as an individual action under 42 U.S.C. 405(g), following the Appeals Council's decision sustaining the termination of his disability benefits (C.A. App. 6; App. 34a). Hyatt added a class action allegation in an amended complaint filed on October 5, 1983, in which Herman Caudle and Mary Lovingood—two other claimants who had received initial decisions terminating their benefits, but whose adminis-

trative appeals were still pending before SSA—were added as named plaintiffs (C.A. App. 15).[3]

In the amended complaint, the plaintiffs contended: (i) that the Secretary could not terminate disability benefits without showing that the claimant's medical condition had improved; (ii) that SSR 82-55 unlawfully deemed hypertension and diabetes mellitus not to be disabling unless they were accompanied by end-organ damage; and (iii) that SSR 82-58 unlawfully provided that subjective complaints of pain would not be considered disabling unless supported by objective clinical findings (App. 31a-32a; C.A. App. 17, 27-28, 34). The plaintiffs alleged that SSR 82-55 and 82-58 were inconsistent with the Fourth Circuit's decisions in *Martin v. Secretary of HEW*, 492 F.2d 905 (1974), and *Myers* v. *Califano*, 611 F.2d 980 (1980), respectively, and that the Secretary therefore had "non-acquiesced" in Fourth Circuit precedent regarding the evaluation of pain, hypertension, and diabetes (App. 32a; C.A. App. 17, 27-28). In a second amended complaint, the plaintiffs subsequently contended that the Secretary also had "non-acquiesced" in *Dotson* v. *Schweiker*, 719 F.2d 80 (4th Cir. 1983), on the medical improvement issue, even though the time within which to seek review of that decision in this Court had not expired (App. 58a-59a).

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[3] There is a serious question whether Lovingood and Caudle could be regarded as proper class representatives. See also note 5, *infra*. On February 27, 1984—prior to the March 26, 1984, order in which the district court certified the class (App. 65a-71a)—the ALJ reversed the state agency's decision and found that Lovingood continued to be disabled (C.A. App. 338-341). Thus, any objection Lovingood had to the manner in which the state agency considered her allegations of pain and hypertension became moot before she was designated by the district court as a class representative. Moreover, Caudle died on October 24, 1983 (App. 35a)—which likewise was prior to the certification of the class—and on May 3, 1984, the Appeals Council reversed the ALJ's decision and held that he continued to be disabled up to the time of his death (C.A. App. 327-329).

In an opinion dated February 14, 1984 (App. 28a-61a), the district court held that the Secretary was required by the doctrine of separation of powers to apply the rulings in *Martin, Myers* and *Dotson* in reviewing the claims of *all* persons residing in the Fourth Circuit, not merely the individual claimants who were parties to those cases. In its subsequent class certification order dated March 26, 1984 (App. 65a-71a), the district court included within the class all North Carolina residents whose claims involved hypertension, diabetes or pain and whose applications were denied or whose benefits were terminated on or after September 10, 1981 (*id.* at 65a-66a). The court included these individuals in the class and ordered the Secretary to provide for the reopening and readjudication of their claims (*id.* at 68a-69a), whether or not they had ever sought administrative review of the preliminary decisions denying their claims and obtained a "final decision" by the Appeals Council, as required by 42 U.S.C. 405(g) and implementing regulations (App. 49a-54a). Moreover, contrary to the requirement of Section 405(g) that a claimant seek judicial review within 60 days of receiving notice that his claim has been disallowed, the September 10, 1981, beginning date for the class was far more than 60 days prior to October 5, 1983, when the class complaint was filed.[4]

2. While the Secretary's appeal from the district court's order was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. That Act had a significant impact on all of the issues in this case.

In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted a new statutory "medical improvement" standard to govern the determination of whether a current recipient of disability benefits continues to be disabled. Section 2(d) of the 1984 Act directed that any case that was then pending

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[4] For the subclass raising the medical improvement issue, the court established a beginning date of October 6, 1982 (App. 66a).

in court and presented the medical improvement question was to be remanded to the Secretary for redetermination under the 1984 Act (98 Stat. 1797-1799). This remand requirement applied to all named and unnamed members of certified classes in pending class actions, whether or not the individual class members had personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). App. 18a-19a; *City of New York*, slip op. 18 n.14. Accordingly, in its initial decision in this case, rendered on March 20, 1985 (App. 16a-27a), the court of appeals ordered the district court to remand to the Secretary the cases of all of the class members whose benefits had been terminated (App. 18a-20a). That ruling was correct as regards the class members raising the medical improvement issue (see *Heckler* v. *Lopez*, 469 U.S. 1082 (1984), and *Heckler* v. *Kuehner*, 469 U.S. 977 (1984)), and it is not at issue here.[5]

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[5] As the court of appeals recognized (App. 26a), the claim of respondent Hyatt, a prior recipient of benefits, was covered by the special statutory remand provisions, and the district court in any event had already remanded Hyatt's individual claim to the Secretary (App. 63a). Lovingood and Caudle also were prior recipients whose benefits had been terminated and therefore also were covered by the special remand provision in the 1984 Act, although they already had been found disabled in the ordinary course of the administrative appeals process. See note 3, *supra*.

Section 2(d)(4) of the 1984 Act provides that the decision by the Secretary on a specially remanded case "shall be regarded as a new decision on the individual's claim for benefits" and "shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [42 U.S.C. 405] and regulations issued by the Secretary in conformity with such Section" (98 Stat. 1798). Consistently with this requirement, the court of appeals ordered the district court to "relinquish jurisdiction" over the remanded claims and to "dismiss [those] claimants without prejudice to their right to seek timely review of the final decisions of the Secretary on remand" (App. 27a). The district court entered such an order on June 25, 1985 (App. 72a-80a). There accordingly is a substantial question whether there has been a proper representative of the remaining class members—*i.e.*, the new-applicant

In Section 3 of the 1984 Act (98 Stat. 1799), Congress enacted new statutory standards for the evaluation of pain. See 42 U.S.C. (Supp. III) 423(d)(5)(A). As the Eighth Circuit held in its first opinion in *Polaski*, Section 3 was intended to ratify the Secretary's approach to the evaluation of pain by " 'put[ting] present regulatory policy into [the] statute' " and " 'more accurately reflect[ing] current policies' " (*Polaski* v. *Heckler*, 751 F.2d 943, 950 (1984), quoting 130 Cong. Rec. H9836 (daily ed. Sept. 19, 1984) (remarks of Rep. Pickle), and H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984)). Similarly, as we explain in *Yuckert* (Pet. Br. 27-28, 44-49; Reply Br. 6-8), Congress ratified the Secretary's "severity" regulation when it enacted Section 4 of the 1984 Act (98 Stat. 1800). The legislative history makes clear that Congress was fully aware of the further articulation of the severity policy in SSR 82-55, in which SSA, "[b]ased on increasing experience and extensive consultation with disability program physicians" (App. 116a), included hypertension and diabetes without end-organ damage among examples of impairments that had been determined to be nonsevere under SSA policy.[6]

3. In light of the intervening enactment of Section 3 of the 1984 Act, the court of appeals concluded in its March 1985 opinion that it would be improper to instruct the

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members who challenged the Secretary's standards for the evaluation of pain, hypertension, and diabetes—since June 25, 1985. There also is a substantial question whether Hyatt, who fully exhausted his administrative remedies before personally seeking judicial review, could in any event be a proper representative under Fed. R. Civ. P. 23(a)(3) of claimants who knowingly declined to pursue their administrative remedies and whose claims therefore are now barred by res judicata. See *Polaski* Pet. 15-16.

[6] The Senate and Conference Reports both refer to regulations addressing the severity policy and state that this policy is "elaborated [upon] in rulings," quoting a sentence from SSR 82-55. See H.R. Cong. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984); compare App. 118a.

Secretary to follow Fourth Circuit precedent on the pain issue when readjudicating the claims that were being remanded to him pursuant to Section 2 of the 1984 Act (App. 19a). The court of appeals likewise declined to order the Secretary to follow circuit precedent with respect to hypertension and diabetes, although the court did not rely on Congress's ratification of the severity regulation when it enacted Section 4 of the 1984 Act. Instead, the court reasoned that because Congress in 1984 had considered but declined to adopt a provision requiring the Secretary to follow a court of appeals' decision within the circuit (App. 20a & n.6, citing H.R. Conf. Rep. 98-1039, *supra*, at 36-38), a judicial order requiring that result would constitute " 'an unwarranted judicial intrusion into this pervasively regulated area' " (App. 21a, quoting *Heckler* v. *Day*, 467 U.S. 101, 119 (1984)).

The court of appeals then addressed the claims of those class members, at issue here, whose new applications for benefits had been denied. The 1984 Act did not provide for the automatic remand of such claims, as it did in Section 2 for terminated beneficiaries who raised the "medical improvement" issue. The court of appeals first held that the district court had erred in concluding that this case fell within the exception to the exhaustion requirement for "wholly collateral" issues, recognized in *Mathews* v. *Eldridge*, 424 U.S. at 330-332, and *Heckler* v. *Ringer*, 466 U.S. 602, 617-618 (1984). The court reasoned that the contention that the Secretary was applying improper standards for the evaluation of pain, hypertension and diabetes was not "wholly collateral," but rather was "inextricably intertwined" with the class members' claims for benefits (App. 22a-23a). The court also held that the 60-day suit-filing requirement in Section 405(g) is jurisdictional and that the district court therefore was without authority to include in the class any individuals who had obtained a final decision of the Secretary more than 60 days before this class action was commenced (App. 23a).

In light of the foregoing holdings, the court of appeals ordered the district court to dismiss the claims of all new-applicant class members who had not satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g) (App. 23a). The court of appeals further ordered the district court to remand to the Secretary the claims of the new-applicant class members who *did* satisfy those requirements. The claims in this category that raised the pain issue were to be reconsidered under the statutory pain standard in Section 3 of the 1984 Act. Although the court was of the view that the 1984 Act did not similarly address the hypertension and diabetes standards (but see page ~~10~~ 9, *supra*), it believed that the Secretary should have an opportunity to reevaluate the remanded claims raising those issues in light of the legislative history of the 1984 Act discussing the "non-acquiescence" issue (App. 23a).[7]

4. Although the claims of the class representatives—Hyatt, Lovingood, and Caudle—were subject to the special remand provisions in Section 2 of the 1984 Act, and although the courts below had relinquished jurisdiction over such claims (see note 5, *supra*), the class representatives nevertheless petitioned for a writ of certiorari. They sought review of the court of appeals' decision insofar as it declined to order the Secretary to readjudicate the claims of the new-applicant class members

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[7] Because Sections 3 and 4 of the 1984 Act ratified the Secretary's policies regarding the evaluation of pain and non-severe impairments—and because the class members' claims therefore were properly evaluated under those policies in the first instance—there was no legal basis for the court of appeals' order requiring the Secretary to readjudicate the claims of any of these new-applicant class members. However, the Secretary elected not to petition for a writ of certiorari to review the court of appeals' original decision in that respect, since the class members who had personally satisfied the prerequisites to suit under 42 U.S.C. 405(g) comprised a very small percentage of the overall class. The readjudication of those persons' claims is now taking place.

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who had not personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). This Court granted that petition and remanded the case to the court of appeals for further consideration in light of *City of New York*. See *Hyatt* v. *Bowen*, No. 85-474 (June 9, 1986).

On remand, the court of appeals reversed its prior holding and ordered the Secretary to readjudicate the claims of *all* new-applicant class members, whether or not they had exhausted their administrative remedies or satisfied the 60-day limitation on judicial review (App. 1a-13a). The court first held, without elaboration, that "[t]he separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action" (App. 4a). It then stated that here, as in *City of New York*, the legal issue involved (the Secretary's supposed "non-acquiescence" in circuit precedent) was "collateral" to the class members' claims for benefits. The court based this conclusion on the theory that the class members did not actually seek benefits from the district court, but instead "asked only that their claims for benefits be remanded to the Secretary for reconsideration in accordance with the Social Security Act as interpreted by the court of appeals for this circuit" (App. 6a). The court also expressed the view that class members would be irreparably injured if the exhaustion requirement were enforced, because claimants suffer anxiety and distress when their claims are denied and because a retroactive award of benefits might be reduced by the payment of attorney's fees (*ibid*).

The court of appeals further held that the 60-day filing period under 42 U.S.C. 405(g) should be tolled for all class members, even though the challenged policies concerning the evaluation of pain, hypertension, and diabetes were contained in published regulations and rulings and therefore were not "secret," as in *City of New York*. The

court reasoned that the Secretary had not published his policy of not following circuit precedent on those issues and that the class members "were entitled to believe that agencies charged with evaluating claims according to law had faithfully performed their duties" (App. 8a-9a).

On the merits, the court of appeals stated that Section 3 of the 1984 Act had superseded prior circuit precedent regarding the evaluation of pain (App. 9a & n.5). But the court did not explain why it nevertheless had ordered the Secretary to readjudicate all claims raising the pain issue, inasmuch as Section 3 had ratified the policies under which the claims at issue had originally been denied. Moreover, the court of appeals once again failed to discuss the impact of Section 4 of the 1984 Act on the application of the "severity" policy under SSR 82-55 to claims based on hypertension and diabetes without end-organ damage.

In the same opinion (but in a separate judgment), the court of appeals awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d) (App. 9a-12a, 92a-103a).

REASONS FOR GRANTING THE PETITION

1. The judgment of the court of appeals in this case requires the Secretary to provide for the reopening and readjudication of an estimated 80,000 disability claims that were denied as far back as 1981. There is no justification for this sweeping and unprecedented order. Each of the thousands of claimants involved received a personal notice informing him that his claim for benefits had been denied at some stage of the administrative review process and that he had 60 days within which to seek further review. Yet each such claimant declined to seek further review, thereby deliberately allowing the denial of his claim to become final and binding against him. As a result, the district court had no jurisdiction over these class members'

claims under 42 U.S.C. 405(g), and their claims are barred in any event by administrative res judicata.

Moreover, as we explain above (see page 9, *supra*) and in our certiorari petition (at 9-10, 21-22) in *Bowen* v. *Polaski*, petition for cert. pending, No. 86-1617, Congress explicitly ratified the Secretary's policies regarding the evaluation of pain under SSR 82-58 when it enacted Section 3 of the Social Security Disability Benefits Reform Act of 1984. Similarly, as we explain in our briefs (Pet. Br. 27-28, 44-49; Reply Br. 6-8) in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (argued Jan. 13, 1987), Congress ratified the Secretary's approach to the evaluation of non-severe impairments when it enacted Section 4 of the 1984 Act. The Secretary's treatment of hypertension and diabetes is merely a particular application of that severity policy. See page 9 and note 6, *supra*. Quite aside from the prerequisites to suit under 42 U.S.C. 405(g) and the bar of res judicata, the court of appeals in this case had no authority to order the reopening and readjudication of claims that were denied under administrative standards that were valid.

The issues in this case are closely related to those presented in *Bowen* v. *Polaski*, an Eighth Circuit-wide class action in which the plaintiffs likewise challenged the Secretary's policies under SSR 82-58 regarding the evaluation of pain. Despite Congress's ratification of those policies in Section 3 of the 1984 Act, the Eighth Circuit in *Polaski* likewise ordered the Secretary to reopen and readjudicate the claims of thousands of class members who did not seek administrative review of preliminary decisions denying their claims for benefits and thereby allowed the denial of their claims to become final and binding. The Fourth Circuit's decision in the instant case strongly reinforces our submission that the Court should grant review in *Polaski*. The decision below demonstrates that the Eighth Circuit's decision in *Polaski* was not a sport, and

that the courts of appeals' misapprehension of the scope of this Court's opinion in *City of New York* has the potential to cause serious disruption of the Social Security disability programs. However, because the issues in the two cases are closely related, we suggest that the Court hold the petition in this case and dispose of it as appropriate in light of the disposition in *Polaski*.[8]

Of course, this case also involves the 60-day limitation on filing suit under 42 U.S.C. 405(g), an issue not presented in *Polaski*. However, if the Court grants the petition in *Polaski* and holds that the Eighth Circuit erred in excusing the claimants there from the jurisdictional and res judicata consequences of their failure to seek further *administrative* review of the denial of their claims within the time allowed, we believe that the Court's reasoning also would require reversal of the Fourth Circuit's holding that the class members in this case could be excused from the consequences of their failure to seek *judicial* review within 60 days. Accordingly, although we would not oppose plenary review in this case as well as *Polaski* if the Court believed that course was necessary in order to resolve the 60-day issue, we do not urge that course at this time.

2. The extraordinary reopening relief ordered by the court of appeals in this case cannot be justified on the theory that the Secretary had unconstitutionally "non-acquiesced" in Fourth Circuit precedent regarding the evaluation of pain, hypertension and diabetes. The court of appeals' reliance on this rationale in ordering the Secretary to provide for the readjudication of 80,000 claims is completely without merit for several reasons.

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[8] In addition, because the challenged approach to the evaluation of hypertension and diabetes was merely a particular application of the severity policy at issue in *Yuckert*, the Court may wish to hold the petition in this case pending the decision in *Yuckert*.

First, as we argued in the court of appeals (C.A. Br. 16-30; Jan. 1987 Reh'g Pet. 6-11), the Secretary's policies embodied in SSR 82-55 and 82-58 regarding the evaluation of pain, hypertension and diabetes were not inconsistent with the Fourth Circuit's decisions in *Martin* and *Myers*. See also *Foster* v. *Heckler*, 780 F.2d 1125, 1129 & nn. 5 and 7 (4th Cir. 1986) (Secretary's pain policy is consistent with circuit precedent). The essential premise of the court of appeals' "non-acquiescence" rationale for dispensing with the prerequisites to suit under 42 U.S.C. 405(g) therefore is without merit.

Second, the Secretary in the instant case did not formally announce that SSA would not follow a particular decision of a court of appeals. The error of the court of appeals' "non-acquiescence" analysis thus follows *a fortiori* from the *Lopez* litigation involving the "medical improvement" issue, where the Secretary had made such a formal announcement and where a majority of this Court nevertheless appeared to see no substance to the constitutional challenge to the Secretary's action. See *Heckler* v. *Lopez*, 463 U.S. 1328, 1336 (1983) (Rehnquist, Circuit Justice), motion to vacate stay denied, 464 U.S. 879 (1983); 464 U.S. at 883 (Stevens, J., concurring and dissenting). Indeed, the rigid rule of mandatory, circuit-wide acquiescence apparently contemplated by the court below is nothing more than a rule of non-mutual collateral estoppel against the Federal Government, which this Court unanimously rejected even as a non-constitutional matter in *United States* v. *Mendoza*, 464 U.S. 154 (1984). See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970). The legislative history of the 1984 Act, moreover, demonstrates Congress's awareness of the litigating considerations that weigh against a rigid rule requiring the Secretary to follow circuit precedent in all circumstances. See 130 Cong. Rec. S11454-S11455 (daily ed. Sept. 19,

1984) (remarks of Sen. Dole); S. Rep. 98-466, *supra,* at 21; H.R. Conf. Rep. 98-1039, *supra,* at 37-38. Furthermore, regulations and rulings on evidentiary questions, such as SSR 82-55 and 82-58, must be sustained by the courts unless they are arbitrary and capricious, even if the courts might reach (or had reached) a different result on similar facts in the absence of such a ruling. *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983).[9]

Third, the policies respondents challenged in this case were embodied in published regulations and rulings, and therefore were not "secret," as the Secretary's policy was found to be in *City of New York*. Thus, there can be no contention in this case that the class members were somehow lulled into inaction because they were unaware of the substantive policies under which their claims were decided.

Fourth, the court of appeals expressly recognized that Section 3 of the 1984 Act has superseded prior circuit precedent regarding the evaluation of pain (App. 9a) and that, under the rule of *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711-716 (1974), and *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102, 110 (1801), Section 3 must be applied to claims pending in the courts

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[9] As we explain in our post-argument brief in *Yuckert* (at 3-5 & nn. 2 and 3), the Secretary has now instituted new procedures to assess adverse appellate decisions and formally to determine whether SSA will follow them within the circuit. To date, SSA has issued 28 rulings stating that it will follow particular adverse appellate decisions at all four levels of the administrative review process when reviewing claims filed by persons residing in the circuit involved; by contrast, it has issued no rulings declining to apply circuit precedent at all four levels. Moreover, SSA has instituted procedures to govern any situation in the future in which it might seek to relitigate in a particular circuit a legal issue that previously was decided adversely to the Secretary by the court of appeals. See App. 94a; 52 Fed. Reg. 2557 (1987) (proposed regulations); *Stieberger* v. *Heckler,* 615 F. Supp. 1315, 1403-1405 (S.D.N.Y. 1985), preliminary injunction vacated, 801 F.2d 29 (2d Cir. 1986).

(App. 19a). Section 3 in turn ratified the Secretary's prior administrative policies regarding the evaluation of pain. See page 9, *supra*. Accordingly, even if the court of appeals, prior to passage of the 1984 Act, might properly have ordered the readjudication of claims on the basis of a finding that the Secretary had failed to follow circuit precedent, it had no authority to order that readjudication after Section 3 of the 1984 Act superseded the very circuit precedent in which the Secretary supposedly had "non-acquiesced." For similar reasons, the court had no authority to order readjudication of claims based on hypertension and diabetes, since Congress approved the severity policy in Section 4 of the 1984 Act.

3. In the same opinion (but in a different judgment), the court of appeals awarded respondents $204,649.90 in attorney's fees and costs under the Equal Access to Justice Act (EAJA) (App. 9a-13a). The court justified its award in part on the ground that respondents were "prevailing parties" under its opinion on remand from this Court, an opinion that ~~which~~ greatly expanded the class of claimants whose claims must be readjudicated (App. 10a). If, as we urge herein, this Court vacates the court of appeals' judgment ordering that readjudication, the court of appeals' separate judgment affirming the award of attorney fees should be reexamined as well.

In addition, the court of appeals' holding that the Secretary's position on the merits was not "substantially justified" cannot be reconciled with Congress's approval of the Secretary's pain and severity policies. Moreover, insofar as the court perceived an alleged failure to follow circuit precedent (rather than the substance of the pain and severity policies) to be the relevant issue, its conclusion that the Secretary's position was not substantially justified is inconsistent with the court of appeals' first decision in this very case, which excluded the class members at issue

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here from reopening relief despite allegations of "non-acquiescence." The court's holding in this respect is also inconsistent with this Court's order refusing to vacate the Circuit Justice's order granting a stay of reopening relief in *Lopez* (discussed at page 16 *supra*), despite similar allegations. Related issues regarding the "substantially justified" standard under EAJA are presented in *Pierce* v. *Underwood,* cert. granted, No. 86-1512 (May 18, 1987). Questions concerning the propriety of awarding attorney's fees at rates in excess of the $75 per hour cap under EAJA are also presented both here (see App. 12a, 85a, 88a) and in *Underwood.* For these reasons, even if the Court were to deny the instant petition on the first question presented, the petition should be held and disposed of as appropriate in light of the decision in *Underwood* insofar as the EAJA issue is concerned.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the certiorari petition or the decision in *Bowen* v. *Polaski,* petition for cert. pending, No. 86-1617, and the decisions in *Bowen* v. *Yuckert,* cert. granted, No. 85-1409, and *Pierce* v. *Underwood,* cert. granted, No. 86-1512.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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